QUESTION PRESENTED

Whether the "Treasury Amendment" to the Commodity Exchange Act, which provides in pertinent part that "[n]othing in this chapter shall be deemed to govern or in any way be applicable to transactions in foreign currency" and in six other specified financial instruments, "unless such transactions involve the sale thereof for future delivery conducted on a board of trade," 7 U.S.C. § 2(ii), bars the Commodity Futures Trading Commission from bringing a judicial enforcement action arising from alleged fraud in connection with foreign currency option contracts.

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No. 95-1181

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM C. DUNN & DELTA CONSULTANTS, INC.,

Petitioners,

v.

COMMODITY FUTURES TRADING COMMISSION, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE BOARD OF TRADE OF THE CITY OF CHICAGO AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

Chief Justice Taft described the Board of Trade of the City of Chicago as "the greatest grain market in the world." *Board of Trade of the City of Chicago v. Olsen*, 262 U.S. 1, 33 (1923).[1] It has long served as a centralized market that provides critical price discovery and hedging functions for a cornucopia of agricultural commodities. By organizing the

[1] Pursuant to S. Ct. R. 37.3(a), the parties have consented to the filing of this brief. Letters evidencing such consent are on file in the Clerk's office.

trading of futures contracts and options contracts on those futures, the Chicago Board of Trade provides the means for businesses to manage the risks they face from fluctuating commodity prices by facilitating arrangements with speculators who are willing to assume the risks that those businesses want to avoid. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 357-59 (1982).

The "great annual flow" of commodities through the Chicago Board of Trade was at one time "made up of the cash grain sold on the exchange, the cash sales to arrive . . . and the comparatively small percentage of grain contracted to be sold in the futures market not settled by offsetting." *Board of Trade*, 262 U.S. at 33. In more recent times, the immense exchange business conducted there has broadened to encompass a large number of contracts that involve U.S. government securities. In 1995, for example, the Chicago Board of Trade was the venue for trading in approximately 162,000,000 futures contracts and options contracts on those futures involving government securities such as Treasury Bonds and Treasury Notes, which constituted about 75% of its business. The Chicago Board of Trade thus now provides businesses throughout the world and all types of financial enterprises, including pension funds, mutual funds and insurance companies, with the same critical price-discovery and hedging functions for those financial instruments that it continues to offer for agricultural commodities.

Each government security that is the subject of a futures contract is a "commodity" under the Commodity Exchange Act ("CEA"). 7 U.S.C. § 1a(3). The CEA regulates all trading in "commodity" futures contracts and options contracts on those futures, as well as options contracts on certain "commodities," including currencies. In general, the CEA requires all futures contracts and options contracts on those futures to be traded on "contract markets" that have been designated as such by the Commodity Futures Trading Commission ("CFTC"), subject to specific exemptions granted by the CFTC. 7 U.S.C. §§ 6(a), 6(c), 6c(b); 17 C.F.R. § 33.3. The Chicago Board of Trade has

been designated by the CFTC as a "contract market," and trading in the millions of futures contracts and options contracts involving government securities that are bought and sold on the Chicago Board of Trade is thus subject to the regulatory scheme provided in the CEA. 7 U.S.C. §§ 7-8.[2]

The Supreme Court's resolution of the issues of statutory construction raised in this case will settle the proper application of the CEA not only to transactions in options contracts involving foreign currencies, but also to futures and options contracts that involve each of the other financial instruments -- including U.S. government securities -- enumerated in the Treasury Amendment, 7 U.S.C. § 2(ii). The Court thus will decide whether dealers operating outside a regulated exchange will be permitted to evade the provisions of the CEA by selling futures and options contracts involving foreign currencies and government securities out of the dealers' own back offices rather than through the open and competitive facilities of a contract market where all facets of trading are subject to regulation by the CFTC. If petitioners' proposed redraft of the Treasury Amendment were to be adopted, the major product lines of the Chicago Board of Trade could be expropriated by off-exchange dealers and purveyed to the same customers the Board of Trade now serves, but without any government oversight or control, thereby greatly undermining the safeguards that Congress provided in the CEA. That result also would deflect many market users from continuing to trade on exchanges, robbing those markets of their liquidity and inflicting grave harm upon the Chicago Board of Trade's ability to continue to carry out its traditional functions of price discovery and risk management, to the detriment of the many businesses that rely upon it for these purposes.

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[2] The CFTC does not regulate options on "commodities" that are also defined as "securities" under the federal securities laws, such as options on government securities, and options on currencies traded on securities exchanges. 7 U.S.C. §§ 2a(i) & 6c(f); 15 U.S.C. §§ 77b(1) & 78c(a)(10).

For these reasons, the Chicago Board of Trade has a direct and immediate interest in the Court's resolution of the issues presented in this case.

INTRODUCTION

The provision of the Commodity Exchange Act at issue in this case, known as the "Treasury Amendment," follows the statutory grant of exclusive regulatory jurisdiction to the CFTC over "accounts, agreements . . . and transactions" involving futures contracts. *See* 7 U.S.C. § 2. Adopted in 1974, the Treasury Amendment excludes from the CEA and hence from the CFTC's jurisdiction "transactions in" seven specified financial instruments -- "foreign currency, security warrants, security rights, resales of installment loan contracts, repurchase options, government securities, or mortgages and mortgage purchase commitments" -- "unless such transactions involve the sale thereof for future delivery conducted on a board of trade." 7 U.S.C. § 2(ii). To appreciate the proper scope of this provision, it is necessary to place it against the broader landscape of the federal laws governing trading in futures contracts, options contracts, and other similar means of hedging commodity prices.

Futures contracts and options contracts are instruments traded by parties that seek to hedge the risk of future commodity price changes or to speculate on those future price changes. While both instruments have a common purpose, they are structured somewhat differently. Futures contracts literally provide for delivery in the future of a commodity at an agreed price. In futures trading, however, delivery of the commodity rarely occurs. Generally, parties to futures contracts discharge their obligations by entering into an offsetting transaction before the contract matures, settling up any differences in cash. In contrast, when a buyer and seller actually intend to perform their contractual obligation to make or take delivery of the commodity at the contract's maturity -- where, for example, the seller is a farmer and the buyer is a grain dealer -- the contract

is known as a "forward contract." *See* T.A. Hieronymous, *Economics of Futures Trading* 31-32 (2d. ed. 1977).

An options contract is a more limited undertaking, at least from the perspective of an options purchaser. Unlike a futures contract, in which each party assumes an unconditional obligation to perform on the contract, the purchaser of an options contract does not incur any obligation to follow through on any later transaction in the underlying commodity. Instead, the options holder agrees to pay a premium in order to acquire a unilateral right to buy or sell a stated amount of the underlying commodity at an agreed price at a fixed point in the future. By contrast, for the party selling or writing the option, the technical contractual obligations are just like a futures contract. If the options purchaser decides to exercise the option, the options writer is obligated to perform by selling or buying the commodity at the price specified in the option. The distinct feature of an options contract is thus that its holder can limit the potential loss to the amount of the premium paid for the option (as compared to both parties to a futures contract and the party writing the option, who face a virtually unlimited risk from price fluctuations in the market). *See* G.L. Gastineau, *The Options Manual* 6-11 (3d. ed. 1988).

The aggregation of such futures and options trades in open, centralized markets provides important "price-discovery" information and hedging services for those who actually engage in buying and selling the underlying commodities. The central problem in regulating futures and options transactions is that though they can serve these public interests while also stabilizing commodity prices, they can also be misused to defraud customers and manipulate markets. In addition, futures and options contracts can be purveyed to unsophisticated members of the business community or the public with minimal cost, through "bucket shops" that are undercapitalized and often have no ability or intent to make good their obligations to their customers. Congress has noted that through the abuse of these instruments, the prices of the underlying commodities "can be manipulated, controlled, cornered or squeezed, to the detriment

of the producer or the consumer." 7 U.S.C. § 5. For three-quarters of a century, therefore, the federal agencies charged with enforcing these regulatory statutes have sought to preserve the beneficial functions of these risk-shifting instruments while limiting their potential for fraud and abuse.

The history of the CEA includes several major enactments. *See Merrill Lynch*, 456 U.S. at 355 n.1. The original Future Trading Act, Pub. L. No. 67-66, 42 Stat. 187 (1921), restricted trading in both futures and options contracts. Grounded in Congress's taxing power, the law was invalidated in *Hill v. Wallace*, 259 U.S. 44 (1922). Reenacted immediately, under the commerce power, as the Grain Futures Act, Pub. L. No. 67-331, 49 Stat. 1491 (1922), this seminal legislation responded to reports of excessive speculation and price manipulations that were occurring on the unregulated grain futures markets. *See, e.g.*, S. Rep. No. 212, 67th Cong., 1st Sess. 4-5 (1921).

Through the provisions of the 1922 legislation, Congress sought to regulate and restrict trading in futures contracts, while allowing parties to enter into legitimate forward contracts of commodities for deferred delivery. This was accomplished by limiting trading in futures contracts to those entities formally designated as "contract markets," while crafting a statutory exception from this requirement for legitimate forward contracts that contemplated the sale or purchase of actual grain. *See* Pub. L. No. 67-331, § 2; *see also*, 61 Cong. Rec. 4762 (1921) (Sen. Capper).[3] All other trading in futures contracts was prohibited. Any such "off-exchange" contracts would be illegal and hence unenforceable in American courts. Congress also broadly prohibited manipulation of the price of both futures contracts and cash commodity

[3] The distinction between futures and forward contracts has been a constant point of uncertainty, since any futures contract not negated by an offsetting transaction would result in an obligation to take delivery of the underlying commodity. *See In re Stovall*, Comm. Fut. L. Rep. (CCH) ¶ 20,941 at 23,779-81(1979) (discussing origins of futures-forwards distinction).

transactions, provisions that remain in effect. *See* 7 U.S.C. §§ 9, 13(a), 13b.

In 1936, Congress remodeled the Grain Futures Act as the Commodity Exchange Act, Pub. L. No. 74-675, 49 Stat. 1491 (1936). This legislation expanded the scope of federal regulation to include certain other agricultural commodities in addition to grain, and added further regulatory safeguards to govern futures trading. *See* CEA, §§ 2(a), 4a, 4b, 4d. Once again, however, Congress carefully excluded forward contracts from the "contract market designation" requirement in the CEA, rewording the existing exclusion to except "any cash commodity for deferred shipment or delivery." *Id.* § 2(a)(1). Congress also gave renewed attention to trading in options contracts, which it regarded as so riddled with fraud and unbridled speculation that it simply enacted an outright ban on all such transactions involving commodities covered under the CEA. *Id.* § 4c(a).

The next far-reaching overhaul of the CEA took place in 1974. *See* Pub. L. No. 93-463, 88 Stat. 1389 (1974). In this legislation, Congress created the CFTC as an independent regulatory entity vested with "exclusive jurisdiction" to regulate futures and options trading and, in particular, to enforce "the basic statutory prohibitions against fraudulent practices and price manipulation, as well as [to exercise] the authority to prescribe trading limits." *Merrill Lynch*, 456 U.S. at 365-66.

Of particular significance to this case, moreover, Congress again broadened the definition of "commodity" under the CEA. For the first time, this term was extended beyond agricultural products to encompass practically any kind of commodity imaginable, including all "goods and articles, except onions," as well as "all services, rights, and interests," as long as futures contracts are traded in those items. 7 U.S.C. § 1a(3). This expanded scope of the term "commodity" meant a greatly expanded regulatory authority for the newly created CFTC.

The expansion of this key definition raised new concerns about how to maintain the traditional framework of the CEA. For the first time, futures contracts in intangible items, including

various financial instruments, were brought within this statutory regime, which seemed greatly to expand the CFTC's responsibilities for preventing cash market manipulation.[4] In addition, the new definition of "commodity" called into question whether the traditional distinction between futures and forward contracts, which excepted actual delivery transactions, such as between farmers and grain elevators, from CEA futures regulation, *see supra* note 3, required clarification as applied to these novel kinds of "commodity," which were not "farmed" *per se*. The Treasury Amendment provided this clarification by specifying that "transactions in" seven specified kinds of financial instruments were not covered by the CEA, unless a transaction "in" any such item had resulted from a purchase or sale "involv[ing]" a futures contract. 7 U.S.C. § 2(ii).[5]

The treatment of options contracts in the 1974 amendments remained quite restrictive. The general prohibition on trading in options contracts involving commodities that had been regulated under the CEA before 1974 remained in place. Yet the CFTC was given authority to decide whether to regulate or prohibit trading in options contracts involving the newly listed commodities. *See* 7 U.S.C. § 6c(b) (1976 & Supp. II 1978). For several years, the CFTC tried simply to regulate options trading, but by 1978 it gave up, persuaded that "the offer and sale of commodity options has for some time been and

[4] As Dr. Clayton Yeutter from the Agriculture Department pointed out to Congress, because "the act proscribes the manipulation of the market price in cash transactions of those commodities covered by the act," the "expansion of the definition of commodities" will result in "a corresponding expansion of such manipulation provisions relating to cash transactions." H.R. Rep. No. 975, 93d Cong., 2d Sess. 76 (1974).

[5] As explained in Section IB, *infra*, a letter from the Acting General Counsel of the Treasury Department, which provided a rationale for this proposed language, responded to concerns about language defining "futures contract" in the Senate Bill, which ultimately was not enacted, but which might have swept within its ambit a variety of transactions consisting of the actual purchase or sale of several different kinds of underlying financial instruments.

remains permeated with fraud and other illegal or unsound practices." 43 Fed. Reg. 16,153, 16,155 (1978). The CFTC thus adopted a regulation banning "the purchase or sale of any commodity option." 17 C.F.R. § 32.11. Congress later codified that prohibition on options trading, to extend until the CFTC documented its ability to regulate such transactions successfully. *See* Pub. L. No. 95-405, 92 Stat. 865, 867 (1978) (codified at 7 U.S.C. § 6c(c)) (Supp. II 1978).

Over the ensuing years, the CFTC gradually loosened the constraints on options trading, and Congress followed suit. *See* Pub. L. No. 99-641, 100 Stat. 3557 (1986). Options trading is now permitted to occur on designated "contract markets," subject to CFTC regulation. 7 U.S.C. § 6c(b); 17 C.F.R. § 33.3. The CFTC also has adopted the "trade option exemption," which exempts from much CFTC regulation, including contract-market designation, any commodity option "offered to a producer, processor . . . commercial user . . . or merchant . . . solely for purposes related to its business as such," 17 C.F.R. § 32.4. In this case, in particular, the court below noted that this regulatory exemption tends to deflect the "potentially dire effects" raised by petitioners' *amici* about the supposed effects of Congress's decision to subject trading in options contracts to regulation by the CFTC. Pet. App. 7a.

Finally, in 1992, Congress directly addressed those "potentially dire effects" by authorizing the CFTC to structure appropriate exemptions for transactions in futures and options contracts from contract market designation and other requirements of the CEA. 7 U.S.C. § 6(c). In 1993, the CFTC exercised its authority to exempt from much CEA regulation currency options traded among professionals and regulated institutions, subject to certain restrictions. *See* 17 C.F.R. Part 35.

SUMMARY OF ARGUMENT

1. The Treasury Amendment excludes from the CEA "transactions in" foreign currency and six other specified financial instruments. It does not employ the broader phrasing -- "transactions involving" these items -- used elsewhere in the statute to describe futures and options contracts, but instead employs the more precise and narrow phrase "transactions in" these items. The plain language of the exemption thus encompasses only those transactions where one of these financial instruments is the specific medium of the transaction, *i.e.*, where it *is* the item being transacted, but does not encompass the purchase or sale of futures or options contracts, which are not "transactions in" the underlying commodities. This is particularly true because several of the specified financial instruments are themselves species of "options contracts," which would make no sense if the phrase "transactions in" already covered all options contracts.

2. No other interpretation is consistent with congressional intent in enacting this provision, which was simply to clarify that the CEA's traditional distinction between futures and forward contracts would be maintained for the broader class of commodities that were now to be brought within the CFTC's jurisdiction by the 1974 amendments. And no other interpretation can be squared with the structure of the statute. In particular, petitioners' interpretation cannot be squared with the 1978 amendments to the CEA, which prohibited options trading altogether. Finally, even if the Court were to find the statutory language ambiguous, then the proper course would be to defer to the consistent interpretation given by the CFTC, which is the federal agency with sole authority to administer and enforce the provisions of the CEA. By contrast, the Treasury Department is in no different position here from any lobbying association that may propose language which is included in a statute, but does not by virtue of that fact gain any entitlement to judicial deference in its interpretation.

3. Petitioners' proposed redraft of the statute would undermine Congress's efforts to ensure orderly regulation and oversight of a broad spectrum of financial transactions. In enacting the CEA, and then later by broadening the definition of the kinds of "commodity" that are embraced within its coverage, Congress intended to establish a comprehensive regulatory scheme to protect the market integrity of futures trading, options trading, and cash transactions involving those commodities. Petitioners' interpretation would open enormous gaps in the CEA where the CFTC would have no authority to prevent undesirable conduct or manipulation of markets. In addition, the meritorious functions performed by such exchanges as the Chicago Board of Trade, whose activities have been found by Congress to be "affected with a national public interest," 7 U.S.C. § 5, would be crippled if futures contracts and option contracts involving currencies and government securities could be bought and sold in dealers' back offices in transactions that are not required to comply with the salutary provisions of the CEA.

4. Finally, petitioners' *amici* suggest that even though foreign currency option contracts should be excluded from the major clause of the Treasury Amendment, the Court should leave open on remand whether petitioners' unsavory activities are brought back under the statute by the minor "unless" clause. They thus ask the Court not to construe the language of the minor clause in deciding this case. This dubious maneuver should be rejected, for it unduly truncates the question on which the Court granted *certiorari*, is inconsistent with that *amici*'s own reading of the statute, conflicts with petitioners' position on this issue, and is simply wrong.

ARGUMENT

I. THE TREASURY AMENDMENT APPLIES TO "TRANSACTIONS IN" SEVEN SPECIFIED FINANCIAL INSTRUMENTS ONLY, AND NOT TO ANY OTHER KINDS OF TRANSACTIONS, SUCH AS THE PURCHASE OR SALE OF FOREIGN CURRENCY OPTION CONTRACTS.

Despite the complex history of the CEA, the narrow issue in this case is whether investments in foreign currency option contracts fall within the scope of the Treasury Amendment, adopted in the 1974 amendments. Any apparent difficulty in explaining this provision can be cleared away by use of the traditional tools of statutory interpretation.

A. The Plain Language of the Statute

The Court's consistent focus in recent years has been, first and foremost, on the plain language of the statute. *See, e.g., Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993). The language at issue here is contained in the authorizing section of the CEA, which gives the CFTC "exclusive jurisdiction . . . with respect to accounts, agreements [including options contracts] . . . and transactions involving contracts of sale of a commodity for future delivery." 7 U.S.C. § 2(i). The Treasury Amendment, which operates as an exclusion from the entire CEA, applies to "transactions in foreign currency, security warrants, security rights, resales of installment loan contracts, repurchase options, government securities, or mortgages and mortgage purchase commitments, unless such transactions involve the sale thereof for future delivery conducted on a board of trade." *Id.* § 2(ii).

The specific issue for decision here is whether the language "transactions in" these specified financial instruments encompasses options contracts that involve these underlying commodities. It plainly does not, for several reasons.

First, it is true of options contracts, as with futures contracts, that "[t]rading occurs in 'the contract,' not in the commodity." *Chicago Mercantile Exch. v. SEC*, 883 F.2d 537, 542 (7th Cir. 1989), *cert. denied*, 496 U.S. 936 (1990). As already explained, options contracts are not and typically do not result in an actual transaction "in" the underlying commodity. An option could only become a transaction in a commodity if it is subsequently exercised -- rather than being "offset" and thus settled in cash or merely allowed to expire, as commonly happens. On those occasions where an option is later exercised, the buyer of the option and the seller could be said at that juncture to engage in a transaction in the underlying commodity by making or taking delivery of it, but no such transaction occurs from mere trading in an "options contract" itself. For this reason, the "option transaction is a long step removed from a transaction in the commodity involved, since the option purchaser, if he or she does nothing more when the specified date arrives, will simply see the option die." *CFTC v. American Bd. of Trade*, 473 F. Supp. 1177, 1183 (S.D.N.Y. 1979), *aff'd*, 803 F.2d 1242 (2d Cir. 1986).[6]

Second, the language used in this statutory section as a whole bears out this understanding. The exclusive jurisdiction conferred on the CFTC is given with reference to three items -- "accounts, agreements . . . and transactions involving contracts of sale of a commodity for future delivery." 7 U.S.C. § 2(i). "Options" are specifically referenced as a species of "agreements," thus signifying Congress's recognition that these transactions occur "in a contract," not "in the underlying commodity." By contrast, the major clause of the Treasury

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[6] By means of illustration, the Seventh Circuit has cogently observed that "'[n]either securities futures nor options on securities lead directly to new capital formation. American businesses raise capital by selling the securities underlying these futures and options; these businesses do not obtain any input of capital when investors purchase futures or options on these securities.'" *Board of Trade v. SEC*, 677 F.2d 1137, 1153 n.28 (7th Cir.) (internal citation omitted), *vacated as moot*, 459 U.S. 1026 (1982).

Amendment refers to "transactions in" the enumerated financial instruments, and this emphasis is echoed in the minor "unless" clause, which provides that the specified transactions are not excluded from the CEA when they "involve the sale *thereof* for future delivery," *i.e.*, the sale *of* the underlying commodity itself.[7]

Furthermore, it is clear that Congress used these terms advisedly. The narrower phrase "transactions in" these items differs from the broader phrase "transactions involving" specified commodities, used in contrasting manner elsewhere in the CEA to refer to futures and options contracts based on those commodities. *See* 7 U.S.C. § 6c(a) (unlawful to enter into "any transaction involving any commodity" used for hedging or determining the price basis of any "transaction in . . . such commodity" when such transaction constitutes a fictitious trade); *id.* § 13(d) (defining felony offenses relating to participation in "any transaction in commodity futures, any transaction in an actual commodity, or in any transaction of the character of or which is commonly known in the trade as an "option"). Indeed, at the same time it enacted the Treasury Amendment, Congress employed the phrase "transactions involving" to describe those options contracts that would be subject to CFTC regulation. 7 U.S.C. § 6c(b).

This congressional distinction is also consistent with the dictionary definitions of these terms. *Compare* WEBSTER'S COLLEGIATE DICTIONARY 585 (10th ed. 1995) (defining "in" as indicating "inclusion . . . *within limits*") (emphasis added) *with id.* at 617 (defining "involve" as indicating "accompaniment"). And even if the matter were uncertain, as a proviso restricting

[7] The Fourth Circuit alone has rejected this conclusion. *See Salomon Forex, Inc. v. Tauber*, 8 F.3d 966 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1540 (1994). It did so in part because of confusion about the structural provisions and legislative history of the CEA, which are discussed in Sections IB and IC, *infra*. Insofar as that court relied at all on the plain language of the statute, however, it went awry by improperly conflating the important distinctions between forward, futures, and options contracts, *see id.* at 975-76.

the statute's principal operation, any ambiguities in the scope of the Treasury Amendment should be narrowly construed. *See, e.g., John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 120 (1993) (favoring "tight reading of exemptions from comprehensive schemes of this kind").

This construction of the Treasury Amendment is also confirmed by a closer examination of the seven specified financial instruments, three of which are themselves species of "options contracts." *See* 7 U.S.C. § 2(ii) (listing "security warrants," "security rights," and "repurchase options"). If the preceding phrase "transactions in" already encompassed all options contracts involving these underlying commodities, it would have made no sense to list several kinds of options contracts in the limiting enumeration. It thus appears that Congress excluded only certain limited categories of options contracts from CEA regulation -- those expressly identified in the Treasury Amendment itself. Applying the established maxim "*expressio unius est exclusio alteris*," therefore, this provision cannot be read to encompass *all* options contracts involving these underlying commodities. *See, e.g., Leatherman v. Tarrant County Narcotics Unit*, 507 U.S. 163, 168 (1993). And any other reading would improperly relegate several of the listed terms to mere surplusage. *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 & n.11 (1988).[8]

In sum, the plain language of the Treasury Amendment encompasses only those transactions where one of the listed financial instruments is the specific medium of the transaction, *i.e.*, where it *is* the item being transacted, but does not

[8] The same analysis holds for the listed pair of terms "mortgages and mortgage purchase commitments." Since the latter is a kind of options contract on a mortgage, there would have been no need to include it in the list if "transactions in" were already understood to encompass options contracts.

encompass the purchase or sale of option contracts, which are not "transactions in" those underlying commodities.[9]

B. The Legislative History

The Court has cautioned parties that it will not "resort to legislative history to cloud a statutory text that is clear." *Ratzlaff v. United States*, 114 S. Ct. 655, 662 (1994). In this case, petitioners' view of the Treasury Amendment relies on such materials to the point of inconsistency with the central purpose of the 1974 amendments as a whole.

In 1974, the two Chairmen of the Conference Committee on the legislation that included the Treasury Amendment underscored "the intent of the committees to fill in all regulatory gaps -- to regulate trading in futures and in options relating to commodities or commodity futures, because such trading is now poorly regulated, if it is regulated at all." 120 Cong. Rec. 34,736 (1974) (Rep. Poage); 120 Cong. Rec. 34,997 (1974) (Sen. Talmadge); *see also Point Landing v. Omni Capital Int'l, Ltd.*, 795 F.2d 415, 420 (5th Cir. 1986) ("Congress intended the 1974 amendments to 'fill all regulatory gaps' while 'avoid[ing] unnecessary, overlapping, and duplicative regulation'") (citation omitted), *aff'd on other grounds*, 484 U.S. 97 (1987). If the CEA were construed to exclude regulation of currency options, this would create an enormous hole in the regulatory net cast by the CEA, and would excuse trading in these options contracts from any effective regulatory safeguards.

This anomalous result would also clash with Congress's description of the Treasury Amendment as nothing more than a "clarify[ing]" provision. *See* S. Rep. No. 1131, 93d Cong., 2d Sess. 23 (1974). If Congress truly intended to remove all off-

[9] Petitioners claim this construction "would lead to an unreasonable result -- since jurisdiction would be based on uncontrollable events in the future." Pet. Br. at 15. This bizarre claim is wholly incorrect, for the upshot is simply that no *options contracts* would be excluded from the CEA.

exchange trading in currency options, currency futures, and futures in government securities from regulation under the CEA, this would have worked a wholesale departure from the considered thrust of its expanded regulatory regime. Such a dramatic shift away from the direction of the 1974 amendments could hardly be dismissed as language that would simply "clarify" its regulatory safeguards, especially since Congress expressly intended in 1974 "that options not be traded except on organized exchanges and in conformity with the rules and regulations of the Commission." *Id.* at 26.

The most sensible explanation of this clarifying language is that it was included to make plain that the established distinction between agricultural forward contracts and agricultural futures contracts was not intended to be confused by the broadening of the definition of commodity to include intangibles such as a variety of financial instruments. Quite apart from the desire expressed in a letter from the Acting General Counsel of the Treasury Department to Senator Talmadge that certain futures trading in foreign currencies not be subject to regulation by the CFTC, *see id.* at 50 -- a desire that the Treasury Department continues to harbor today -- the language proposed in the Treasury Amendment responded to a different concern expressed in that same letter. This concern was over language contained in the proposed House and Senate bills, which defined the term "commodity" so broadly that it could have encompassed "transactions in" a variety of financial instruments, which usually occur "between large, sophisticated institutional participants." *Id.* at 51. One Senate bill of particular concern to Treasury would have defined a "futures contract" as "an agreement to buy or sell for delivery at a future time any specified quantities of goods, services, or other tangible or intangible things." *Id.* at 50.

The Treasury Department was correct that this language would have been unduly broad, including, for example, retail purchases of consumer goods for future delivery, agricultural forward contracts, and the sale of a security that is settled and delivered a few days in the future. In the end, therefore,

Congress opted to enact the House version of the legislation, which did not disturb the traditional forwards/futures distinction and, to "clarify" this point, adopted the Treasury language as well.[10] The CFTC's contemporaneous view thus explained that without this provision, "various sections of the [CEA,] as amended, would have given the CFTC jurisdiction over cash market manipulations of financial instruments for which a futures contract market had been designated." *SEC-CFTC Jurisdictional Correspondence*, Comm. Fut. L. Rep. (CCH) ¶ 20,117, at 20,831-41 (Dec. 3, 1975).

C. The Structure of the Statute

The Fourth Circuit alone has disagreed with this reading of the Treasury Amendment. It did so based on two points that it drew from an erroneous understanding of the structure and purpose of the statute. *See Salomon Forex*, 8 F.3d at 975.

The principal point relied on by the Fourth Circuit was that the CEA had always regulated "only futures and options and never spot transactions or cash forwards." *Id.* Thus, if the Treasury Amendment did not address futures and options contracts, but only the category of "cash market" transactions such as forward contracts, "no amendment would have been necessary," for this provision "can only have meaning if it is interpreted to exclude something more than that which was already excluded before it was enacted." *Id.*

This argument is flawed. As an initial matter, it reflects a mistaken view of the statutory regime. The CEA does *not* regulate *only* trading in futures and options contracts. It also contains various provisions applicable to cash transactions, *i.e.*, purchases and sales, with actual delivery, of the commodity itself. Although such transactions need not be conducted on a

[10] Part of the muddled legislative history behind the Treasury Amendment is thus explained by the fact that it was directed in part to troublesome provisions in the Senate version of the bill, which were never enacted. It thus becomes more difficult to trace the import of its language for the law as finally enacted.

regulated exchange, the CEA imposes various prohibitions -- *e.g.*, on cornering, price manipulation, and false market reporting -- that apply to such transactions. 7 U.S.C. §§ 7, 9, 13; *see id.* § 6i (reporting requirement for cash transactions).

More importantly, this view issues from the infallible certainty of hindsight, and thus fails to recognize the situation at the time the Treasury Amendment was adopted. This provision was proposed as a measure to "clarify" uncertainty on this point that had sprung up anew in light of the expansion of the term "commodity" in the 1974 amendments to cover intangibles such as the great variety of financial instruments. *See* Section IB, *supra*. The whole notion of "cash market" transactions and "forward" contracts in intangible commodities, which had never been confronted before under the CEA, raised novel issues that Congress sought to clarify by specifying that the CFTC would not have authority to regulate "transactions in" the specific list of financial instruments enumerated in the Treasury Amendment. By insisting that this provision forcibly be given a distinct substantive meaning, rather than viewing it as what Congress said it was -- a mere clarifying measure -- the Fourth Circuit misunderstood its essential thrust and thus was obliged to depart from the plain language of the provision.

In addition, the *Tauber* court stated that the meaning of the exclusion contained in the major clause of the Treasury Amendment must be broader than the meaning of the subsidiary exception contained in the minor "unless" clause of that provision, for otherwise the minor clause would have no meaning. *Salomon Forex*, 8 F.3d at 975. Thus, since the court viewed the minor clause as reinstating CFTC regulation of futures trading in the specified instruments, the major clause must "reach beyond transactions in the commodity itself and to include all transactions in which foreign currency is the subject matter, including futures and options." *Id.*

Aside from the dichotomy between this construction and the plain language of the provision -- the court implicitly acknowledged that it read the major clause to "*reach beyond*" "transactions in [the specified financial instruments]," *id.* -- it

rests upon an erroneous view of the provision as a whole and of the relation between its two clauses.

The purpose of the Treasury Amendment as a whole was simply to "clarify" Congress's continued adherence to the consistent principles of the CEA. *See* Section IB, *supra*. Accordingly, the minor clause was designed to confirm that even though the major clause had excluded cash and forward transactions in the enumerated instruments from regulation under the CEA, the statute would still apply when those otherwise excluded transactions "involved" futures contracts conducted on a board of trade. In this regard, both the 1974 House and Senate committee reports discussed the futures delivery process where trades were "settled by an actual delivery." H.R. Rep. No. 975, at 149; S. Rep. No. 1131, at 17. Congress therefore was well aware that actual "transactions in" commodities could result from futures trading. If all actual transactions were excluded from the CEA, however, then the statute would not apply to the futures delivery process. Congress enacted the minor clause to "clarify" that it did not intend to create any such important gap in the CEA's coverage by retaining the CFTC's authority to regulate any "actual delivery" transactions in one of the enumerated financial instruments under a futures contract.[11]

The minor clause thus simply applied the CEA's basic principles to some of the new categories of intangible commodities now to be covered under the statute for the first time. Indeed, the Fourth Circuit's reading of the minor clause of the statute -- which suggested that "off-exchange" trading would be entirely freed from any regulation, while only trading on a formal exchange would lie within the CFTC's jurisdiction -- would create the same errant incentives and problems of encouraging trading by undercapitalized "bucket shops" that the CEA has always been designed to prevent.

[11] The wisdom of Congress's inclusion of the minor clause in this clarifying amendment was recently confirmed by a CFTC enforcement action in which the defendant was found to have attempted to corner the market in a particular government security through cash market transactions that were related to its futures trading account. Those improper cash market activities would have fallen outside the CEA entirely but for the minor clause, which applied because the activities involved futures contracts. *See In the Matter of Fenchurch Capital Mgmt., Ltd.*, No. 96-7 (CFTC July 10, 1996).

Finally, a critical shortcoming of petitioners' suggested interpretation of the Treasury Amendment is that it cannot be squared with later congressional modifications of the CEA. The most important of these, for purposes of this case, was the 1978 prohibition on trading in options contracts. In enacting this bar, Congress codified the previous ban that had been adopted by the CFTC. *See* 7 U.S.C. § 6c(c) (Supp. II 1978); 17 C.F.R. § 32.11. As explained earlier, the CFTC had arrived at that juncture after experimenting with the regulation of options trading for several years, based on its conclusion that "the offer and sale of commodity options has for some time been and remains permeated with fraud and other illegal or unsound practices." 43 Fed. Reg. 16,155 (1978).

If petitioners are correct that all trading in options contracts involving foreign currencies was not subject to CEA regulation in 1974, *then the 1978 ban on options trading could not have applied to non-exchange options trading in foreign currencies*. It is thus telling that the courts have held that trading in foreign currency options *was* barred by the 1978 ban, regardless of the Treasury Amendment. *See CFTC v. Sterling Capital Co.*, Comm. Fut. L. Rep. (CCH) ¶ 21,169, *modified by* ¶ 21,170 (N.D. Ga. 1981); *CFTC v. American Bd. of Trade*, 803 F.2d 1242, 1246-48 (2d Cir. 1986).

D. *Chevron* Deference

Finally, even if the Court were to find that the language of the Treasury Amendment is ambiguous as applied to the issues raised in this case, then the appropriate course would be to defer to the CFTC's reasonable interpretation of this provision of the CEA. *See, e.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). In this regard, the critical point is that the CFTC is the

federal government agency with sole authority to administer and enforce the provisions of this statute. *See, e.g.*, 7 U.S.C. §§ 1a(2), 2, 4a, 12a(5); *see also CFTC v. Schor*, 478 U.S. 833, 842-44 (1986) (referring to the "sweeping authority Congress delegated to the CFTC generally" to enforce the CEA). Congress delegates such authority to a particular agency when it recognizes that it cannot foresee and resolve all the problems that may arise in implementing the terms of the statute and thus confers upon the enforcing agency the responsibility to do so. *See Chevron*, 467 U.S. at 843-45.

By contrast, the Treasury Department's views on these matters are not entitled to deference here. Treasury is not the agency upon whom Congress has conferred the delegated authority to administer the statute, and thus to undertake "the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Chevron*, 467 U.S. at 843 (internal quote omitted); *see also Adams Fruit Co. v. Barnett*, 494 U.S. 638, 649 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority."); *Holly Farms Corp. v. NLRB*, 116 S. Ct. 1396, 1401 (1996) (courts "must respect the judgment of the agency empowered to apply the law to varying fact patterns") (internal quotes omitted). Indeed, Treasury is in no different position from any lobbying association which may propose specific language that is included in a statute, but does not by virtue of that fact gain any entitlement to judicial deference in its interpretation. *See Smiley v. Citibank (S.D.), N.A.*, 116 S.Ct. 1730, 1733 (1996) ("We accord deference to agencies under *Chevron*, not because of a presumption that they drafted the provisions in question . . . but rather because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows."). In addition, a more specific contextual problem looms: as the Seventh Circuit has noted, "We have no grounds to believe that the Senate

Committee adopted the opinion of the Treasury Secretary concerning the scope of the Treasury Amendment." *Board of Trade v. SEC*, 677 F.2d at 1154 n.34. It would thus be unfounded, as well as inappropriate, for the Court to prefer Treasury's views to those of the CFTC in interpreting this provision of the CEA.

The CFTC's contemporaneous construction of the Treasury Amendment, once again, is consistent with the reading given it by the court below. *See SEC-CFTC Jurisdictional Correspondence, supra*, at 20,831-41. As shown already, the CFTC's position is based on a reasonable -- and indeed -- correct interpretation. Because this is the CFTC's "contemporaneous interpretation of the statute it is entrusted to administer," which is both "eminently reasonable and well within the scope of its delegated authority," the Court must accord "considerable weight" to that position. *Schor*, 478 U.S. at 844.[12] In any case of statutory ambiguity, however, such deference is dispositive, for the Court has held that the responsible agency's "reasonable interpretation of the law . . . merits our approbation." *Holly Farms*, 116 S. Ct. at 1406.

II. PETITIONERS' PROPOSED REDRAFT OF THE STATUTE WOULD UNDERMINE CONGRESS'S EFFORTS TO ENSURE ORDERLY REGULATION AND OVERSIGHT OF A BROAD SPECTRUM OF FINANCIAL TRANSACTIONS.

Petitioners' proposed redraft of the statute also would undermine Congress's avowed efforts to ensure orderly regulation and oversight of a broad spectrum of financial

[12] In addition, because Congress has explicitly conferred "exclusive jurisdiction" upon the CFTC to administer the provisions of the CEA, this case does not present the problems that arise from a "split enforcement" structure, whereby more than one agency is given functions to perform in administering a single statute. *See, e.g., Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 151-52 (1991).

transactions. In enacting the CEA, and then later by broadening the definition of the kinds of commodities that are embraced within its coverage, Congress intended to establish a comprehensive regulatory scheme to promote market integrity in futures trading, options trading, and cash transactions involving those commodities. If the Court were to rewrite the Treasury Amendment along the lines sought by petitioners, enormous gaps would be opened where the CFTC would be unable to exercise any authority to prevent the manipulation of markets. *See* Section IB, *supra*.

In addition, the important functions performed by such established exchanges as the Chicago Board of Trade would be crippled if futures contracts and option contracts involving government securities and foreign currencies could be bought and sold in dealers' back offices in transactions that are not required to comply with any provisions of the CEA. Today, trading in futures contracts involving government securities and in options contracts on those futures constitutes approximately 75% of the daily volume on the Chicago Board of Trade. This trading could readily evaporate if over-the-counter dealers could offer the same futures and options contracts to the same customer base that the established exchanges now serve. Dealers could offer the same products on a much cheaper basis by evading the costs attendant upon federal regulation, while avoiding the safeguards that Congress established to deter manipulation of the underlying commodity markets.[13]

[13] Futures contracts on government securities and options contracts on those futures are not themselves "securities" that are subject to regulation under the federal securities laws. As the result of an agreement reached by the Securities and Exchange Commission and the CFTC, legislation enacted in 1982 ensured that the CFTC would "continue to have exclusive jurisdiction over all permissible futures contracts based on exempted securities as well as options on those futures contracts," S. Rep. No. 384, 97th Cong., 2d Sess. 23 (1982), while the SEC "was expressly allocated jurisdiction over put and call options on exempt and non-exempt securities," H.R. Rep. No. 565 97th Cong., 2d Sess., pt. 2 at 8 (1982).

Some firms are engaging in this activity right now, having taken the position that the Treasury Amendment excludes all such trading from coverage under the CEA. The established exchanges already are paying a heavy competitive price for that statutory misreading. In 1995, the trading volume in over-the-counter derivatives, which either are or compete with futures contracts and options contracts, increased by nearly 60%. *See, e.g., OTC Fin. Transactions at Record Levels*, Fin. Times, July 11, 1996, p. 18. In contrast, in the first half of 1996, the Chicago Board of Trade's trading volume in government securities futures and related options declined about 7% from 1995 levels, and such trading in 1995 declined more than 9% from 1994 levels.

If that trend continues, the viability of the American futures exchanges and the public interests they serve will be in grave jeopardy.[14] Centralized exchange trading is, as Congress has determined, "affected with a national public interest." 7 U.S.C. § 5. These exchanges have been designed to provide liquid trading environments where contracts are entered into openly and competitively, without risk of a counterparty default. The trading that occurs on them provides reliable and accurate price discovery for a wide range of goods and instruments -- including government securities -- which many businesses use as a benchmark for everyday commercial transactions. If these traditional exchanges were to cease to exist, their central price-discovery function would be fulfilled on an episodic basis at best, resulting in a clear competitive advantage for those in our

[14] By contrast, the "dire predictions" (Pet. App. 7a) raised by petitioners' *amici* if the Court were to confirm the Second Circuit's position -- already more than a decade old -- that options trading is subject to CFTC oversight and the safeguards contained in the CEA are vastly overstated. The CFTC already has confirmed that options transactions among commercial businesses and institutional and professional traders do not need to be traded on designated contract markets. *See* 17 C.F.R. § 32.4 and Part 35. In both cases, the CFTC retained its antifraud protections and certain other tailored safeguards. Petitioners' claim that mere prohibitions on fraudulent conduct will deter legitimate business activity is completely implausible.

economy with the resources to obtain far-flung pricing data at the expense of smaller businesses who will be dealing in the dark. Markets that had been well served by organized exchanges, including the market for government securities, will experience substantially greater price instability and volatility. In the context of government securities, that uncertainty will translate into broader price swings and higher interest rates that the government and ultimately the taxpayers would have to pay to finance our nation's debt.

Moreover, this Court is obliged to accept Congress's explicit legislative findings that regulation of trading in both futures contracts and options contracts is "imperative for the protection of" commerce in the underlying commodities and to protect "the national public interest." 7 U.S.C. § 5; *see Board of Trade*, 262 U.S. at 37-38. These congressional findings are incompatible with petitioners' claimed "regulation-free zone" for trading in futures contracts and options contracts involving such commodities as government securities and foreign currencies.[15] Allowing such futures contracts and options contracts to be marketed without basic federal protections against price manipulation, fraud, unfair pricing, and financial insecurity would, according to the congressional judgments embodied in existing law, endanger the essential public interests that the CEA was designed to promote and safeguard.

[15] Even putting aside the detrimental competitive implications of that result, it would make no sense to leave off-exchange dealer markets in futures and options contracts unregulated, while heavily regulating the exchange markets in those same instruments, unless the dealer markets were much *less* risky than the exchanges. In fact, however, just the opposite is true, as the CFTC has explained. *See, e.g.*, 52 Fed. Reg. 47,022 (1987) (describing "safeguards" provided in exchange markets that are not generally available elsewhere).

III. CONSTRUCTION OF THE ENTIRE TREASURY AMENDMENT, INCLUDING BOTH ITS MAJOR AND MINOR CLAUSES, IS APPROPRIATE IN REACHING A RESOLUTION OF THIS CASE.

Finally, petitioners' *amici* suggest that even though foreign currency option contracts should not be understood to be covered by the principal clause of the Treasury Amendment, it would remain open on remand to consider whether petitioners' unsavory activities are covered by the minor "unless" clause, and thus are subject to regulation by the CFTC on that basis. They thus importune the Court not to construe the "board of trade" language of the minor clause in deciding this case. *See* Brief *Amici Curiae* of the Foreign Exch. Comm. in Support of Pet. at 25-27.

This dubious maneuver should be rejected, for four reasons. First, it represents an improper attempt to truncate the question framed by petitioners, on which the Court granted *certiorari* in this case. The Question Presented is "[w]hether the Treasury Amendment" *as a whole* -- both clauses of which are then quoted in the Question itself -- exempts trading in option contracts involving foreign currencies from the CFTC's jurisdiction. *See* Pet. at i. The Court has emphasized that it requires strict compliance with its rules governing the questions presented for review, *see, e.g.*, *Yee v. City of Escondido*, 503 U.S. 519, 535-38 (1992), which address both what is fairly included and what is fairly excluded by the petition's statement. In particular, the Court's rules provide that the "statement of any question presented is deemed to comprise every subsidiary question fairly included therein," and only "the questions set out in the petition, or fairly included therein, will be considered by the Court." S. Ct. R. 14.1(a). Unquestionably the "board of trade" issue is both explicitly "set out in the petition" *and* "fairly included" in the question presented.

Second, that *amici*'s own interpretation of the Treasury Amendment relies on their construction of the language contained in both clauses. *See* Brief of Foreign Exch. Comm.

at 22-23. They thus ask this Court to hamstring itself into a one-sided interpretive inquiry by artificially dividing up the intertwined parts of a single sentence – drawing upon the second clause of the sentence where they believe it helps their position, but ignoring that same clause where they recognize that its construction would be disadvantageous to them. The neutral tools of statutory construction should not be converted into such a self-serving one-way ratchet.

Third, in any event petitioners strongly disagree with their *amici* on this point, asserting that their fraudulent conduct falls outside of the "board of trade" provision in the minor clause. *See* Pet. Br. at 16-20. In fact, they do not even agree that the issue remains open in this case, wrongly contending that respondents conceded the point in their opposition to *certiorari*. *Id.* at 5 n.5.[16] Petitioners instead take the position that their "off-exchange" transactions in options contracts involving foreign currency simply were not "conducted on a board of trade" within the meaning of this phrase as used in the Treasury Amendment. *See id.* at 5, 7 n.7, 8-9, 16-20.

Fourth, petitioners and their *amici* are plainly wrong on this point of pure statutory construction. The phrase "board of trade" as used in the Treasury Amendment is a defined term under the CEA. "The term 'board of trade' means any exchange or association, whether incorporated or unincorporated, of persons who are engaged in the business of buying or selling any commodity." 7 U.S.C. § 1a(1). Although Congress certainly could have limited this definition only to an organized trading exchange, as petitioners would prefer, it did not do so. Instead, the term explicitly embraces "any exchange *or association . . . of persons*" engaged in the business of buying or selling any commodity. The term "commodity," in turn, is defined expansively to include "all services, rights, and

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[16] Respondents accurately stated that petitioners' trading occurred "outside of an organized exchange," Opp. at (I), but respondents did not believe that this answered the question of whether such trading occurred on a "board of trade" as described in the Treasury Amendment, *see id.* at 10-12.

interests in which contracts for future delivery are presently or in the future dealt in." 7 U.S.C. § 1a(3).

Petitioners easily come within Congress's express definition of a "board of trade." Petitioners comprise several investment companies and one of their principals who associated together to engage in the business of soliciting and executing the purchase and sale of different forms of options contracts in foreign currencies, involving "the sale thereof for future delivery." *See* Pet. App. 1a-2a. A statutory definition of what a term "means" is binding upon the courts. *See, e.g.*, *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150 (1947). There is simply no reason why this Court should struggle to avoid the plain consequences of this definition, particularly where they are in line with the general purposes of the CEA, which is designed to regulate a broad spectrum of conduct affecting commodities markets. *See Babbitt v. Sweet Home Chapter Communities for a Great Oregon*, 115 S. Ct. 2407, 2417 (1995) (where Congress includes an "obviously broad word" in an "important statutory definition," it "deserves a respectful reading"); *see also CFTC v. Co Petro Mktg. Group, Inc.*, 680 F.2d 573, 581-82 (9th Cir. 1982) ("board of trade" is defined to mean any "association of persons" and not simply a formally organized commodity exchange).

This interpretation of the minor "unless" clause also harmonizes the statutory language and congressional intent underlying both clauses. As noted above, *see* Sections IB & IC, *supra*, the minor clause merely aids in clarifying the application of the CEA to the new categories of intangible commodities encompassed by the 1974 amendments. As used in this clause, the "board of trade" language is essentially descriptive, rather than restrictive. Given that the entire Treasury Amendment was intended only as a "clarify[ing]" provision, *see* S. Rep. No. 1131 at 23, it is not surprising that even if the kinds of fraudulent activities perpetrated by petitioners were somehow held to be excluded by its major clause, they would still come within the minor clause and thus be subject to regulation under the CEA.

Finally, even if this Court were uncertain about the ambit of the minor "uniess" clause, it would again be proper to defer to the CFTC's consistently broad interpretation of Congress's definition of the term "board of trade." *See, e.g.*, CFTC Interpretive Letter 77-12, Com. Fut. L. Rep. (CCH) ¶ 20,467, at 21,911-12 (Aug. 17, 1977); *In re Stovall*, Comm. Fut. L. Rep. (CCH) ¶ 20,941, at 23,779-82 & n.28 (Dec. 6, 1979); *Co Petro*, 680 F.2d at 576.

CONCLUSION

For the foregoing reasons, as well as those set forth in respondents' brief, the decision below should be affirmed.

Respectfully submitted,

Kenneth W. Starr
Counsel of Record
Mark D. Young
Richard A. Cordray
KIRKLAND & ELLIS
655 Fifteenth Street N.W.
Washington, D.C. 20005
(202) 879-5000

August 30, 1996 *Attorneys for the Amicus Curiae*